Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-246

UNITED STATES OF AMERICA, *Petitioner*

v.

ROY C. HOPKINS, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR RESPONDENT IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-25a) is reported at 206 Ct. Cl. 303, 513 F.2d 1360.

JURISDICTION

The judgment of the Court of Claims was entered on March 19, 1975. The petition for writ of certiorari was filed on August 15, 1975, within time as extended. Ju-

risdiction of this Court has been invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether this Court should review a decision of the Court of Claims holding that that Court has jurisdiction to entertain a claim against the United States for the improper discharge of an employee of the Army and Air Force Exchange Service.

STATUTE INVOLVED

The Tucker Act, 28 U.S.C. 1491, provides in pertinent part:

> The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. *For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States. . . .*

The italicized language was added in 1970 by Pub. L. 91-350, 84 Stat. 449, which amendment is the subject of the petition herein.[1]

[1] Pub. L. 91-350 also added the identical language to 28 U.S.C. 1346(a)(2), which grants the District Courts concurrent jurisdiction with the Court of Claims for claims not in excess of $10,000.

STATEMENT OF THE CASE

On August 6, 1968, respondent[2] was discharged from his position as a civilian employee of the Army and Air Force Exchange Service for alleged acts of misconduct.

Respondent filed suit in the Court of Claims to recover back pay from the United States on the grounds his discharge (1) was arbitrary and capricious, (2) was a breach of his contract of employment, and (3) was in violation of due process and of prescribed regulations and procedures. Jurisdiction was asserted under the Tucker Act, 28 U.S.C. 1491, which provides jurisdiction over claims founded upon express or implied contracts with the United States, or founded upon the Constitution, any Act of Congress, or any regulation of an executive department.

The government moved below to dismiss on the procedural ground that no claim stated was within the jurisdiction of the Court of Claims because (1) respondent as a military exchange service employee was not a "federal" employee and therefore was not entitled to judicial review of his discharge, and (2) respondent's exchange employment was not based on an express or implied contract and therefore respondent did not have a contract claim. The denial of the motion is the subject of the pending petition.

In 1970, the Tucker Act, which is the jurisdictional statute for the Court of Claims, was amended. Pub. L. 91-350, 84 Stat. 449. Prior thereto that Court had re-

[2] Respondent died on June 7, 1974. His widow has initiated probate proceedings in California and upon appointment will be substituted as party plaintiff pursuant to Rule 66(a) of the Court of Claims.

jected jurisdiction of claims arising from transactions by claimants with military exchanges and other non-appropriated fund instrumentalities of the United States on the theory the United States had not assumed responsibility for obligations of those instrumentalities and therefore had not waived sovereign immunity in respect to such claims.[3]

In all other legal areas, however, the military exchanges and certain other non-appropriated fund instrumentalities had been treated for jurisdictional purposes as full agencies of the federal government.[4]

The genesis of the Court of Claims non-jurisdiction holdings was *Standard Oil Company of California* v. *United States,* 316 U.S. 481, 86 L. ed. 1611 (1942), wherein it was held that military post exchanges are "arms of the government." *Id.* at 485. However, the Court also said the "government assumes none of the financial obligations of the exchange." *Id.* at 485.

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[3] *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (1953); *Pulaski Cab Company* v. *United States,* 141 Ct. Cl. 160, 157 F. Supp. 955 (1958); *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964); *Kyer* v. *United States,* 177 Ct. Cl. 747, 369 F. 2d 714 (1966).

[4] Thus, the United States is the proper party to sue in contract and to recover on behalf of an exchange. *United States* v. *Howell,* 318 F. 2d 162 (9th Cir. 1963) The United States may prosecute for the filing of a false statement with the exchange service under a statute prohibiting the uttering of such a statement to an agency of the United States. *Brethauer* v. *United States,* 333 F. 2d 302 (8th Cir. 1964) And it is well established that the waiver of tort liability under the Federal Tort Claims Act extends to negligence of exchange service employees although the statute refers only to the employees of the government. *United States* v. *Holcombe,* 277 F. 2d 143 (4th Cir. 1960).

The non-assumption of financial obligations prompted the Court of Claims to reject jurisdiction over non-appropriated fund instrumentalities in light of that Court's doctrine that jurisdiction under the Tucker Act extends only to claims where there exists constitutional or statutory authority mandating federal compensation expressly or by implication.[5] There being no financial obligation, and thus no mandated compensation, there is no jurisdiction. *G. L. Christian and Associates* v. *United States,* 160 Ct. Cl. 1, 312 F.2d 418 (1963), *cert. denied.* 375 U.S. 954 (1963).

There were four controlling cases prior to the 1970 Tucker Act amendment wherein jurisdiction over non-appropriated fund instrumentalities was rejected in accordance with the above cited doctrine and they are especially important because the legislative history of the amendment, discussed hereafter, establishes that it was Congress' specific and singular purpose to overcome those four particular cases:

(1) *Borden* v. *United States,* 126 Ct. Cl. 902, 116 F. Supp. 873 (1953): jurisdiction rejected in claim by Army and Air Force Exchange Service employee to recover salary allegedly improperly withheld. The Court noted:

> "We think it proper that this situation [lack of jurisdiction] should be called to the attention of the Congress." (*Id.* at 909)

(2) *Pulaski Cab Company* v. *United States,* 141 Ct. Cl. 160, 157 F.Supp. 955 (1958): jurisdiction rejected

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[5] This doctrine is spelled out most thoroughly in *Eastport* v. *United States,* 178 Ct. Cl. 599, 372 F.2d 1002 (1967), involving the Maritime Commission.

in claim of proprietor of cab service to Fort Leonard Wood Post Exchange for ten percent of agreed upon gross receipts.

(3) *Keetz* v. *United States,* 168 Ct. Cl. 205 (1964): jurisdiction rejected in claim of Army and Air Force Exchange Service employee for improper discharge in violation of Air Force regulations. The Court noted:

> ".....it is up to Congress to remedy this apparent harsh result, and the Courts should refrain from legislating by judicial fiat." *Id.* at 207.

(4) *Kyer* v. *United States,* 177 Ct .Cl. 747, 369 F.2d 714 (1966): jurisdiction rejected in claim to recover brokerage commission for services to an Executive branch committee not supported by appropriated funds. The Court noted:

> "We are mindful of the fact that the result reached spells an unduly harsh outcome. Plaintiff has searched in vain for a forum in which the merits of his claim might be aired. We add, though perhaps of little comfort, that the lack of jurisdiction which plaintiff has faced at every turn is a matter *which sorely needs Congressional correction.*" *Id.* at 754 (Italics supplied)

All four cases relate to claims for pay or personal services as distinguished from claims of supply or construction contractors. *Borden* and *Keetz* were employee claims, *Kyer* was a personal claim for brokerage commission, and only *Pulaski* involved a commercial type contract and even that was for services rather than supply or construction.[6]

[6] Petitioner's footnote 9 (Pet. 8) states one case (*Keetz*) involved an employee claim and "all other cases cited in the legislative history dealt with independent contractors, not employees." This is erroneous and misleading. The cases cited in the legislative history pertinent to the jurisdictional problem with which Congress was concerned are the four set forth above, other citations in the history being to collateral matters. Two of the named four involved pay claims of employees.

LEGISLATIVE HISTORY

The 1970 amendment to the Tucker Act arose from S. 980 (84 Stat. 449). Senator Tydings opened hearings on S. 980 with the comment "the present immunity from contract suit afforded non-appropriated fund activities was an anomaly of the law which needed to be changed."[7] Senator Hruska stated "[T]he purpose of this bill is to fill a loophole."[8]

The predecessor bill to S. 980 was S. 3163, for which hearings were also held.[9] The Chairman of the House Committee on the Armed Forces testified in support of the bill because, he stated, it is ".... a necessary measure to correct a jurisdictional gap in the Tucker Act."[10]

Chief Judge Cowen of the Court of Claims supported S. 3163 as follows:

> "As you know, in the several cases involving non-appropriated fund activities which the Court of Claims has been compelled to dismiss because of lack of jurisdiction the Court in each case pointed out the need for legislation to bridge this

[7] Hearings on S. 980 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 91st Cong., 1st Sess. (1969) at 1.

[8] *Id.* at 6.

[9] Hearings on S. 3163 Before the Subcommittee on Improvements in Judicial Machinery of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968).

[10] *Id.* at 84.

curious, this anomalous, this unwarranted gap in the law.

So, I can sum up quickly, Mr. Chairman, by saying that the judges of the Court of Claims are unanimously in favor of the legislation, and *that we have no suggestions for any changes or amendments.*" [11] (Emphasis supplied)

The Senate Judiciary Committee, in Senate Report No. 268, reported favorably on S. 980, stating the need and purpose to be as follows:

". . . . The Courts have repeatedly held, however, that the Federal Government's liability to suit under these sections only exists with respect to contract obligations to be paid out of appropriated funds. See, *e.g., Kyer* v. *United States,* 369 F.2d 714 (Ct. Claims 1966); *Pulaski Cab Company* v. *United States,* 157 F.Supp. 955 (Ct. Claims 1968); *Keetz* v. *United States,* 168 Ct. Claims 205 (1964); *Borden* v. *United States,* 116 F. Supp. 873 (Ct. Claims 1953). . . .

The injustice and inequity involved by this Tucker Act "loophole" have been recognized often. See *e.g., Borden* v. *United States,* 116 F. Supp. 873, 878-880 (Ct. Claims 1953)." [12]

On the House side hearings were held on S. 980.[13] The House Judiciary Committee reported favorably, setting forth the need and purpose of the bill in the same language used in Senate Report No. 268 except for the use of "loophole" in lieu of "gap" in reference

[11] *Id.* at 193-194.

[12] S. Rep. No. 268, 91st Cong., 1st Sess. (1969)) (Libr. Cong. 1-2: 12834-2) at 2.

[13] Hearings on S. 980 Before Subcommittee No. 4 of the House Committee on the Judiciary, 91st Cong., 1st Sess., Ser. 4 (1969).

to the jurisdictional hiatus.[14] The four key cases, *Borden, Pulaski, Keetz* and *Kyer,* were again cited as the parameters of the jurisdictional "loophole." [15]

ARGUMENT

Summary

Employees of the military exchange services, now numbering some 100,000 (Pet. 5), have in the past been jurisdictional pariahs, deprived of right to judicial remedy for their claims as a result of a "loophole" or "gap" in the law formed by four key cases, *Borden, Pulaski, Keetz* and *Kyer.* On the urging of the Court of Claims, Congress undertook to close the "loophole" or "gap" and did so on the premise that such employees were contractual rather than "federal" employees. Petitioner now argues, in reversal of position in the key cases, that exchange service employees are not contractual, nor are they "federal", but rather are in an intermediate status, one unfounded in legal precedents, and that therefore the jurisdiction loophole or gap has not been closed.

The Court of Claims was correct in continuing established precedent that exchange service employees are contractual and, if so, this ends the matter. Even if not, however, Congress intended to close the "loophole" or "gap" and has effectively erased the prior basis for rejecting jurisdiction over such employees' claims.

The Court of Claims is the expert court on the jurisdictional issues involved and its decision corrects a longstanding injustice, as Congress directed be done.

[14] H.R. Rep. No. 91-933, 91st Cong., 2d Sess. (1970), 2 U.S. Code Cong and Admin. News 1970.

[15] *Id.* at 2.

There is no legal issue here warranting review by this Court.

1. Exchange Service Employment Is Contractual

Petitioner argues the lower court's fundamental error was holding that exchange service employees enjoy a contractual relationship with the employer. (Pet 6) Petitioner is on the horns of a dilemma. Unquestionably there would be jurisdiction if respondent was a "federal" employee or if, on the other hand, he had an express or implied employment contract. Consequently, petitioner argues respondent was in neither status but in an undefined intermediate one, unfounded in judicial decisions or legal treatises, wherein he had no rights at all.[16]

Petitioner cites government regulations whereby employment of an exchange employee is referred to as "appointment" but the regulations cited also use the words "employ", "employment", and "employee", as well. The words "employ" and "appoint" can be and are used interchangeably in and out of government. Petitioner has always insisted, and continues to, that an exchange employee is not a "federal" employee. It is hornbook law that, except for federal and other public employees, the relationship of employer and employee is contractual. 53 Am. Jur. 2d, Master and Servant, § 14.

The Court of Claims has consistently held that an exchange service employee has a contractual relationship and is not a "federal" employee. (See the Court's

[16] The Court of Claims rejected petitioner's argument and stated that an exchange service employee must be either a federal employee or a contractual employee. (Pet. App. 7a)

discussion of said holdings at Pet. App. 6a-7a.) These holdings were in accord with petitioner's prior position before that Court; and in this case the Court noted petitioner's sudden change of position:

> "We find it a bit ironic that in the instant case, the Government argues just the opposite. We can only assume that this inconsistency has occurred because the enactment of Pub. L. 91-350 now grants jurisdiction for exchange contract claims. We hold the Government's contract theory in *Keetz* to be correct and see no reason to change in the instant case." [17] (Pet. App. 7a, fn. 6)

2. Legislative History of 1970 Amendment

Petitioner argues that in the 1970 amendment to the Tucker Act, Congressional concern focused upon claims under contracts for construction, supplies, or services. The legislative history cited definitely does not support this but reflects that Congress referred simply to contracts, and that Congress was well aware of employee claims.

[17] Petitioner's unexplained reversal of position is inconsistent with the position held in the past by the Civil Service Commission. After *Standard Oil Company of California* v. *Johnson, supra,* legislation was proposed (enacted and now 5 U.S.C. § 2105(c)), and the Chairman of the Commisison submitted its position to Congress by letter dated July 23, 1951, addressed to the Hon. Tom Murray:

> "Based upon early decisions of the Court of Claims, and decisions of the accounting officers of the Government, the Commission determined that employees of post exchanges were not Government employees in the executive service but were employees of the exchanges *working under what amounted to a private contract of employment.* This ruling was followed prior to a decision of the Supreme Court of the United States concerning the status of Army post exchanges (*Standard Oil Company* v. *Johnson*, 316 U.S. 418, decided June 1, 1942)." H.R. No. 1995, 82d Cong., 2d Sess., U.S. Code Cong. & Adm. News 1952, p. 1523. [Italics supplied]

The history establishes that the parameters of the "loophole" or "gap" which Congress undertook to fill by the 1970 amendment were formed by *Borden, Pulaski, Keetz* and *Kyer*. Two were employee cases and two were for personal services. None was for supply or construction. Respondent knows of no explicit reference by Congress to supply or construction contracts.

Congress does not refer to employees explicitly but it had no need to. Two of the four cases not only were employee cases but informed Congress that according to *stare decisis* exchange service employees were contractual rather than "federal" employees.

The government did not inform Congress that it no longer considered exchange employees not to be contractual or that they would not be covered by the pending amendment.

Thus, Congress had before it a "loophole" or "gap" in jurisdiction illustrated by employee and personal service claims which had been judicially determined to be contract claims. In any event, Congress articulated clearly its intent to close completely the "loophole" or "gap", and the Court of Claims has recognized this as it was obligated to do. Petitioner should not be heard to reverse its position in order "to create loopholes through which clever defendants may ultimately retreat into the anachronism of government immunity that the bill seeks to eradicate," a development the Senate emphatically hoped to prevent. Senate Report No. 268, *supra.*, at 6.

3. The Fifth Circuit "Conflict

Petitioner contends *Young* v. *United States*, 498 F. 2d 1211 (5th Cir. 1974), "is a decision in conflict." This

is not entirely so. The Fifth Circuit held jurisdiction *did* exist on the grounds a discharge in violation of military regulations governing exchange service employees would be a violation of due process subject to review under the Administrative Procedure Act. (5 U.S.C. 701 *et seq.*) It rejected jurisdiction under the Tucker Act because of a purported absence in the 1970 amendment or its legislative history to specific reference to employee claims.

The Fifth Circuit is no doubt correct in holding that the Administrative Procedure Act is applicable but it is unfortunate that the Fifth Circuit's *Young* case predated the Court of Claims decision in the present case. The Court of Claims commented on the *Young* decision's rejection of the Tucker Act amendment:

> "We respectively differ.
>
> The *Young* court completely overlooked the reference in both the House and Senate reports to cases decided by this Court involving exchange employees and the harsh result of our lack of jurisdiction. This specific reference to *Keetz, supra; Pulaski Cab Company, supra; Kyer, supra;* and *Borden, supra,* in our mind, negates any argument that Congress did not intend to cover exchange employee contracts when it enacted Pub. L. 91-350." (App. 9a)

It would appear that the Fifth Circuit did not have before it an adequate exposition of the legislative history.

CONCLUSION

A writ of certiorari should not be issued because the Court of Claims decision relates to a legal area peculiarly within that Court's cognizance, is based on long established precedents which petitioner itself has heretofore advanced in the courts, carries out the Congressional intent of the 1970 amendment to the Tucker Act, and there is no legal issue warranting review by this Court.

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September 9, 1975